UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

EMMANUEL ZARCO,

Plaintiff,

v.

VWR INTERNATIONAL, LLC, et al.,

Defendants.

Case No. 20-cv-00089-HSG

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Re: Dkt. No. 39

Plaintiff Emmanuel Zarco brings this suit against VWR International, LLC ("VWR"), Avantor, Inc., and Avantor Performance Materials, Inc. (together, "Defendants") alleging violations of the California Fair Employment and Housing Act ("FEHA"), the California Family Rights Act ("CFRA"), and public policy. Dkt. No. 1, Ex. 1 ("Compl.") ¶¶ 21–56. Pending before the Court is Defendants' motion for summary judgment. *See* Dkt. No. 39 ("Mot."), 48 ("Opp."), 49 ("Reply"). For the reasons explained below, the Court **GRANTS** Defendants' motion.

I. BACKGROUND

Plaintiff Emmanuel Zarco began working for VWR as a chemical tracking coordinator in March 2016. Dkt. No. 48-1, Declaration of Jason M. Erlich ("Erlich Decl."), Ex. 2. VWR is "a global scientific laboratory supply and distribution company." Dkt. No. 41, Declaration of Andrew Koo ("Koo Decl.") ¶ 2. In 2018 Plaintiff worked as one of two VWR employees working on site at the facilities of BioMarin Pharmaceutical, Inc. ("BioMarin"), a VWR customer. *Id.* ¶¶ 2, 6. Plaintiff's duties included "handling and delivering hazardous chemicals throughout the BioMarin facility, [performing] physical inventory management, operating basic warehouse equipment, and conducting safety and equipment inspections through the campus." *Id.* ¶ 6; *see also* Dkt. No. 42, Declaration of Adam Friedenberg ("Friedenberg Decl."), Ex. A ("Zarco Dep.")

at 18:7-33:8.

Plaintiff was diagnosed with congestive heart failure in 2002. Zarco Dep. at 43:1-5. Around February or March 2018, Plaintiff told his supervisor, Andrew Koo, that he need to have surgery in March "to have a device implanted to assist his heart's ability to pump blood, and that he would ultimately need a heart transplant." Koo Decl. ¶ 7. In a report dated March 13, 2018, Plaintiff's cardiologist, Hemal Parekh, MD, stated that Plaintiff was not "able to perform work of any kind" from March 12, 2018 until October 1, 2018. Dkt. No. 40, Declaration of Alyson Contrisciano ("Contrisciano Decl."), Ex. A at 57–58. Plaintiff applied for a leave of absence under the Family Medical Leave Act ("FMLA"), and VWR granted Plaintiff a 12-week unpaid leave. Contrisciano Decl. ¶ 4. VWR covered Plaintiff's position with temporary workers at a higher cost. Koo Decl. ¶ 8.

Plaintiff's FMLA leave ended by mid-2018 and Plaintiff had no available paid sick leave or vacation time. Contrisciano Decl. ¶ 5. Plaintiff requested continued unpaid leave in June. *Id.* In a report dated June 6, 2018, Dr. Parekh provided an update detailing that Plaintiff "cannot do any work that requires more than a half-hour of sitting, standing, [or] walking," that Plaintiff was "unable to work in any capacity," and that no workplace adjustment could be made to allow Plaintiff "to return to work and consistently perform the job duties." *Id.*, Ex. B at 187–88. Dr. Parekh also noted that Plaintiff's restrictions would be permanent "unless he gets a heart-kidney transplant and then recovers from that surgery," and that Plaintiff's condition would continue "for at least 6 months to a year with transplant and it could take at least 6 months to get a transplant." *Id.* Though Mr. Koo had told human resources that it was not feasible to use temporary replacements indefinitely, VWR approved ADA leave through October 1, 2018. Contrisciano Decl. ¶ 5.

On October 4, 2018, Plaintiff met with Mr. Koo. Koo Decl. ¶ 9. According to Mr. Koo, Plaintiff told him that he "was still unable to lift or move anything, and that his medical restrictions had not changed," but Plaintiff was "feeling like he might be able to work part time at a fully deskbound job." *Id.*; *see also* Erlich Decl., Ex. 10 at VWR00558 (October 2018 email from Mr. Koo informing HR that Mr. Zarco had told Mr. Koo that he could not lift or move

anything, and noting that Mr. Koo did not presently have a position that could fit with Mr. Zarco's medical restrictions).[1] Plaintiff attests that he told Mr. Koo that he could "[d]o a few minutes of sitting, few minutes of walking," but Plaintiff also acknowledges that his doctor had not cleared him to perform any aspect of his old job at the time of that discussion with Mr. Koo. Zarco Dep. at 74:6-12, 75:22-76:3. Mr. Koo told Plaintiff to follow up with human resources about next steps. Koo Decl. ¶ 9. In an email informing human resources about his meeting with Plaintiff, Mr. Koo said "honestly, he is a great worker but at this point there is no way we can have him on the team until we either have a position that [] satisf[ies] his medical restriction[s] or he gets better . . . I have told him to contact" human resources and UNUM, VWR's disability plan administrator. Erlich Decl., Ex. 10 at VWR00558. According to Alyson Contrisciano, one of VWR's human resources employees, both human resources and UNUM tried to follow up with Plaintiff and his doctor in October 2018. Contrisciano Decl. ¶ 6, Ex. C.

Ms. Contrisciano emailed Plaintiff stating that his leave was last approved through October 1, 2018 and that VWR was "waiting on updated documentation to be able to approve your leave through a new date." *Id.*, Ex. D at VWR00257. On October 18, 2018, Plaintiff responded indicating that he was "in the process of getting" the medical forms to UNUM, but "[f]or the meantime" attached a doctor's note dated October 17, 2018 stating he would "be out until Feb 2019." *Id.* The doctor's note, signed by Wing Kay Pui, PA-C, stated that Plaintiff "is placed off work from 10/1/2018 through 2/1/2019." *Id.* at VWR00258. Soon after, UNUM sent Ms. Contrisciano a further report from Dr. Parekh. *Id.*, Ex. E. In that report dated October 19, 2018, Dr. Parekh stated that Plaintiff "is on the heart transplant waiting list" and that he expected Plaintiff to return to work, likely with restrictions, within "6 months – 1 year after [the] heart transplant." *Id.* at VWR00384. Dr. Parekh's report described Plaintiff's restrictions as "no heavy lifting or vigorous exertion," and no "prolonged periods" of sitting or standing "due to shortness of breath and fatigue." *Id.* He further indicated that workplace assistance adjustments to help

[1] Plaintiff attests that he does not "remember word for word," but he "think[s] that" the characterization that Plaintiff told Koo his restrictions had not changed or that he could not lift or move anything "may be accurate." Zarco Dep. at 76:4-15.

Plaintiff return to work were not applicable. *Id.*

In response to the update, Ms. Contrisciano told UNUM that "we are no longer able to hold his position with no return date expected." Erlich Decl., Ex. 13 at VWR00127. According to VWR, it was no longer "feasible" to cover Plaintiff's position with temporary workers. Koo Decl. ¶ 10. On November 5, 2018, Ms. Contrisciano emailed Plaintiff stating that VWR received the "latest doctor's note" indicating that Plaintiff would "be out 6-12 months following surgery that is not yet scheduled." Contrisciano Decl. ¶ 7, Ex. F at VWR00161. She informed Plaintiff that VWR could not accommodate his requested leave and that it would "process a termination of employment effective" November 5, 2018. *Id.* She further advised Plaintiff that he should reapply for a position "when [he] was able." *Id.*

In January 2019, Plaintiff had a successful heart transplant. Dkt. No. 48-1 at 53:14-17. Plaintiff felt well enough to work by July 2019. Zarco Dep. at 125:11-13. Plaintiff began to apply to jobs by October 2019. *Id.* at 123:23-124:7. Plaintiff received one offer that he rejected because the position involved driving to different sites. *Id.* at 126:1-6; 127:1-8. On May 7, 2020, Plaintiff was "placed off work from 3/1/2020 through 9/1/2020." Friedenberg Decl., Ex. B. In October 2020, VWR offered Plaintiff an "inventory coordinator" position. Koo Decl. ¶ 11. Plaintiff told Mr. Koo that his termination had a significant "affect [sic] on me" and noted that he was unsure whether his "trust in the company" could be "regained at this time." Koo Decl. ¶ 11, Ex. A. Plaintiff ultimately declined the offer. *Id.* Plaintiff began working as a caregiver for an elderly individual in January 2021. Dkt. No. 48-2 ("Zarco Decl.") ¶ 3.

II. LEGAL STANDARD

Summary judgment is proper when a "movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is "material" if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is "genuine" if there is evidence in the record sufficient for a reasonable trier of fact to decide in favor of the nonmoving party. *Id.* The Court views the inferences reasonably drawn from the materials in the record in the light most favorable to the nonmoving party, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.

574, 587–88 (1986), and "may not weigh the evidence or make credibility determinations," *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir. 1997), *overruled on other grounds by Shakur v. Schriro*, 514 F.3d 878, 884–85 (9th Cir. 2008).

The moving party bears both the ultimate burden of persuasion and the initial burden of producing those portions of the pleadings, discovery, and affidavits that show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Where the moving party will not bear the burden of proof on an issue at trial, it "must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102 (9th Cir. 2000). Where the moving party will bear the burden of proof on an issue at trial, it must also show that no reasonable trier of fact could not find in its favor. *Celotex Corp.*, 477 U.S. at 325. In either case, the movant "may not require the nonmoving party to produce evidence supporting its claim or defense simply by saying that the nonmoving party has no such evidence." *Nissan Fire & Marine Ins. Co.*, 210 F.3d at 1105. "If a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if the nonmoving party would have the ultimate burden of persuasion at trial." *Id.* at 1102–03.

"If, however, a moving party carries its burden of production, the nonmoving party must produce evidence to support its claim or defense." *Id.* at 1103. In doing so, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co.*, 475 U.S. at 586. A nonmoving party must also "identify with reasonable particularity the evidence that precludes summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996). If a nonmoving party fails to produce evidence that supports its claim or defense, courts enter summary judgment in favor of the movant. *Celotex Corp.*, 477 U.S. at 323.

III. DISCUSSION

Plaintiff brings the following causes of action (1) disability discrimination; (2) failure to accommodate; (3) failure to engage in interactive process; (4) retaliation; (5) failure to prevent

discrimination or retaliation; (6) discrimination and retaliation under CFRA; and (7) wrongful termination. Compl. ¶¶ 21–56. Defendants contend that Plaintiff cannot establish a triable issue of fact as to any of his claims. Defendants also challenge Plaintiff's entitlement to punitive damages.

A. FEHA claims

i. Disability Discrimination

Section 12940(a) of FEHA prohibits an employer from discharging an employee because of that employee's physical disability. "An employer may, however, lawfully discharge an employee who 'is unable to perform his or her essential duties . . . even with reasonable accommodations.' " *Lawler v. Montblanc N. Am., LLC*, 704 F.3d 1235, 1241 (9th Cir. 2013) (quoting Cal. Gov't Code § 12940(a)(1)). To establish a prima facie case of disability discrimination, Plaintiff must show that he "(1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability." *Sandell v. Taylor-Listug, Inc.*, 188 Cal. App. 4th 297, 310, (Ct. App. 2010).

When analyzing disparate treatment claims under FEHA, California courts use the three-stage burden shifting test set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Guz v. Bechtel Nat. Inc.*, 24 Cal. 4th 317, 354 (Cal. 2000). Under that framework, the plaintiff must first establish a prima facie case of discrimination; the burden then shifts to the employer to show a "legitimate, nondiscriminatory reason" for the adverse employment action; and finally the burden shifts back to the plaintiff to prove that the employer's asserted reasons for the action are pretextual. *Hanson v. Lucky Stores Inc.*, 74 Cal. App. 4th 215, 224 (Ct. App. 1999). But the burden is reversed when an employer moves for summary judgment. *Lawler*, 704 F.3d at 1242.

Accordingly, Defendants bear the initial burden of showing either that Plaintiff cannot establish one of the elements of the FEHA claim, or that "there was a legitimate, nondiscriminatory reason" for the decision to terminate Plaintiff. *See id.* (citation omitted). If Defendants meet their initial burden, then Plaintiff must demonstrate that Defendants' showing is

"insufficient" or that there is a "triable issue of fact material to [Defendants'] showing." *See id.*

Here, Defendants have met their initial burden by showing that Plaintiff cannot establish one of the elements of the FEHA claim: namely that Plaintiff was able to perform his job (or any job) at the time of his termination. In June 2018, Dr. Parekh said that Plaintiff was "unable to work in any capacity," that no accommodations would allow him to return to work, and that these restrictions would be permanent unless Plaintiff got "a heart-kidney transplant and then recover[ed] from that surgery." Contrisciano Decl. Ex. B at 187–88. Defendant granted ADA leave through October 1, 2018 on this basis. *Id.* ¶ 5. Then on October 17, 2018, Dr. Parekh's physician's assistant prepared a note "plac[ing] [Plaintiff] off work" from October 1, 2018 through February 1, 2019, which Plaintiff described as "a doctor's note stating that I will be out until Feb 2019." *Id.* Ex. D. Consistent with all of this, in a "medical questionnaire" two days later, Dr. Parekh indicated that he did not expect Plaintiff to return to work, likely with restrictions, until "6 months – 1 year after [the] heart transplant," and answered "N/A" to the question "What workplace adjustments can be made to help your patient return to work and consistently perform his/her job?" *Id.* Ex. E at VWR00384. Accordingly, the record unambiguously shows that Plaintiff was not cleared by his medical providers to return to work at any point before his termination, and that no one could predict when he might be cleared to work (which was understandable, because that clearance was contingent on a transplant operation that had not yet even been scheduled).[2]

Plaintiff points to the meeting he had with Mr. Koo in which he says he indicated that he felt he could return to work. But that meeting occurred two weeks before the October 17 "off work" note and the October 19 questionnaire indicating that Plaintiff could not return until after his as-yet-unscheduled transplant. *See id.* In light of the unambiguous medical evidence, the Court finds that Plaintiff's statement that he felt he could return to work does not create a triable

[2] Plaintiff argues that Dr. Parekh's report does not explicitly state that Plaintiff was "unable to work." Opp. at 7. But the medical provider questionnaire indicated that "a reply of 'no work' or 'totally incapacitated' is not sufficient. Contrisciano Decl. ¶ 6, Ex. E at VWR00384. In any event, Dr. Parekh's "N/A" response to the "adjustments" question, together with the physician's assistant's note and Plaintiff's own characterization, leave no room for any triable issue of fact as to this question.

issue. *See Kennedy v. Applause, Inc.*, 90 F.3d 1477, 1481 (9th Cir. 1996) (affirming summary judgment on ADA claim and finding plaintiff's "uncorroborated and self-serving" testimony "contradict[ed] her prior sworn statements and the medical evidence" regarding the extent of plaintiff's disability and ability to work). The record shows that Plaintiff's medical providers consistently indicated that he was unable to work. Plaintiff's self-diagnosis to the contrary cannot create a material issue of fact. And Plaintiff does not point to any evidence that reveals any arguable ambiguity in the October doctor's reports (or prior reports). *See Swonke v. Sprint Inc.*, 327 F. Supp. 2d 1128, 1134 (N.D. Cal. 2004) (holding that finding a genuine dispute where medical notes stated without ambiguity that plaintiff was unable to return to work "would be to engage in a level of fiction unwarranted by controlling legal standards").

Plaintiff also argues that the burden shifting approach is unnecessary in light of direct evidence of discriminatory animus. Opp. at 10. "Direct evidence is evidence which, if believed, proves the fact [of discriminatory animus] without inference or presumption." *Godwin v. Hunt Wesson, Inc.*, 150 F.3d 1217, 1221 (9th Cir. 1998) (citation omitted). Plaintiff points to Mr. Koo's statement in the following email to human resources:

> [H]e told me his restrictions have not changed, he cannot lift or move anything. Once I have a doctor's note of his restriction[s], I can give you some better info. At this point I don't have any work that can fit his restrictions, and it[']s already October 5th. Do we have to wait for the employee to give notice or can the company start to take steps to part ways with the associate? I don't want to do this [to] him because honestly, he is a great worker but at this point there is no way we can have him on the team until we either have a position that [] satisf[ies] his medical restriction[s] or he gets better and can do the work at my site.

Erlich Decl., Ex. 10. Plaintiff contends that this evidence reflects animus because defendants "expected [Plaintiff] to return to work full time and without restrictions." Opp. at 10. Specifically, Plaintiff points to Mr. Koo's response at deposition when questioned whether it was his "understanding" that Plaintiff "had to be at a hundred percent" to return to work. *See* Erlich Decl., Ex. 1 ("Koo Dep.") at 91:24-16. Mr. Koo responded that his understanding was that Plaintiff "had to be cleared for work," and deferred to human resources. *Id.* at 92:17-22. Contrary to Plaintiff's contention, even making all reasonable inferences in Plaintiff's favor, Mr. Koo's

deposition testimony does not reflect, or suggest, a "100% healed" or "fully healed" policy. *See* Opp. at 10. Plaintiff also argues that there is substantial circumstantial evidence of Defendants' animus. *Id.* at 10–11. Plaintiff points to the following answer from Mr. Koo's deposition testimony:

> We've been providing temps for way too long, and it's costing us 40 percent over the markup of that position. Over time, that -- we're going to lose money on this. And I'm sorry to say – I hate that. I hate to say that, but it's business. At bottom line, it's business, and I needed a body for that.

Koo Dep. at 107:18-25. Plaintiff argues that this financial justification somehow contradicts Defendants' stated basis for terminating Plaintiff. Opp. at 11. Defendants respond that it is undisputed that "VWR terminated Plaintiff because he was unable to work, and that he was unable to work because he was medically disabled." Reply at 7.

Because the record reflects that VWR believed it was not feasible to use temporary workers indefinitely due to financial factors and customer relationship issues, the Court does not find VWR's justification inconsistent in any way, or reflective of any animus. *See* Contrisciano Decl. ¶ 5; Koo Decl. ¶¶ 8, 10. Plaintiff has not pointed to any evidence that would support an inference that VWR's proffered reason was pretextual or that he was fired for a retaliatory reason. The Court also finds there is no direct or circumstantial evidence of discriminatory animus such that a reasonable jury could conclude that Defendants engaged in intentional discrimination. While it is doubtless a painful experience to be fired (or to have to fire someone), terminating an employee based on his inability to work is not "animus": it is conduct expressly allowed by FEHA.

Because Plaintiff fails to show any triable issue of fact as to whether he was able to perform his job at the time of his termination, or as to the legitimacy of Defendants' proffered nondiscriminatory reasons, the Court **GRANTS** Defendants' motion as to the disability discrimination claim.

ii. Retaliation

"[T]o establish a prima facie case of retaliation under the FEHA, a plaintiff must show (1) he or she engaged in a 'protected activity,' (2) the employer subjected the employee to an adverse

employment action, and (3) a causal link existed between the protected activity and the employer's action." *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th 1028, 1042 (Cal. 2005). When a defendant seeks summary judgment on a plaintiff's retaliation claim under FEHA, California follows the *McDonnell Douglas* burden shifting analysis "to determine whether there are triable issues of fact for resolution by a jury." *Loggins v. Kaiser Permanente Int'l.*, 151 Cal. App. 4th 1102, 1108–09 (Ct. App. 2007). "In evaluating a legitimate nondiscriminatory reason, the ultimate issue is simply whether the employer acted with a motive to discriminate illegally. Thus, legitimate reasons in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." *Lawler*, 704 F.3d at 1243 (emphasis omitted) (internal quotations and citation omitted).

Plaintiff argues that Defendants fired him after he requested an accommodation in October 2018. Opp. at 21 and n.5. As to the causal link, Plaintiff contends that the timing of his termination, less than four weeks after meeting with Mr. Koo and two weeks after VWR received the updated doctor's note, raises a triable issue. *Id.* at 21–22. Defendants contend that Plaintiff had been on leave for nearly eight months by the time he requested his third leave and that VWR terminated Plaintiff for a legitimate, nondiscriminatory reason. Mot. at 14; Reply at 7, 14.

Even assuming that the evidence here suffices to establish a prima facie case, the Court finds that Defendants have shown that there were legitimate, nonretaliatory reasons for their decision, including that Plaintiff could not perform his duties and that it was not feasible to cover Plaintiff's position with temporary workers indefinitely for financial and customer service reasons. *See* Contrisciano Decl. ¶ 5; Koo Decl. ¶¶ 8, 10; *see also Dep't of Fair Emp. & Hous. v. Lucent Techs.*, Inc., 642 F.3d 728, 746 (9th Cir. 2011) (holding that employer provided a legitimate, nondiscriminatory reason for terminating an employee because of employee's "inability to perform the essential functions of" his position and defendant's "inability to reasonably accommodate him"). As previously noted, Plaintiff does not point to any evidence that raises a reasonable inference that he was terminated for any improper motive. Accordingly, Plaintiff has not provided "substantial responsive evidence" that VWR's reasons were "untrue or pretextual." *See Loggins*, 151 Cal. App. at 1109;

see also Lawler, 704 F.3d at 1244 ("A plaintiff must offer 'specific' and 'substantial' circumstantial evidence to prove pretext in a retaliation claim under FEHA.") (citation omitted).

Because Plaintiff has not raised a triable issue as to whether VWR's stated legitimate reasons were pretextual, the Court **GRANTS** Defendants' motion for summary judgment as to the retaliation claim.

iii. Failure to Prevent Discrimination and Retaliation

Section 12940(k) of FEHA prohibits an employer from "fail[ing] to take all reasonable steps necessary to prevent discrimination and harassment from occurring." This subsection describes a separate unlawful employment practice. *See Lucent Techs., Inc.*, 642 F.3d at 748 (citing *Carter v. California Dep't of Veterans Affs.*, 38 Cal. 4th 914, 925 n.4 (Cal. 2006)). But "employers are not liable for failing to take necessary steps to prevent discrimination, 'except where the [discriminatory] actions took place and were not prevented.' " *Id.* (citations omitted). Because the evidence creates no triable issue of fact as to whether VWR discriminated or retaliated against Plaintiff, the Court **GRANTS** Defendants' motion for summary judgment as to the claim of failure to prevent discrimination and retaliation.

iv. Failure to Accommodate and Failure to Engage in the Interactive Process

Section 12940(m)(1) of FEHA makes it unlawful for an employer to "fail to make reasonable accommodation for the known physical . . . disability of an . . . employee." "The essential elements of a failure to accommodate claim are: (1) the plaintiff has a disability covered by the FEHA; (2) the plaintiff is a qualified individual (i.e., he or she can perform the essential functions of the position); and (3) the employer failed to reasonably accommodate the plaintiff's disability." *Cuiellette v. City of Los Angeles*, 194 Cal. App. 4th 757, 766 (Ct. App. 2011). And section 12940(n) of FEHA makes it unlawful for an employer to "fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability."

Defendants argue that Plaintiff was "medically unable to perform his actual job duties, *or any work*, at the time of his termination." Mot. at 10. VWR granted Plaintiff's previous requests

for leaves of absence in March and June. With respect to any further requests for accommodation, Defendants reiterate that the medical evidence indicated that no accommodation was applicable and that Plaintiff "would remain unable to work indefinitely" in light of his unscheduled heart transplant. Reply at 9.

Courts "cannot impose upon the employer an obligation to engage in a process that was guaranteed to be futile." *Swonke*, 327 F. Supp. 2d at 1137 (finding that "no accommodations . . . could have possibly been consistent with the medical opinion that [plaintiff] was totally disabled from any employment"); *Markowitz v. United Parcel Serv., Inc.*, No. SACV151367AGDFMX, 2016 WL 3598728, at *7 (C.D. Cal. July 1, 2016), *aff'd*, 711 F. App'x 430 (9th Cir. 2018) (same). To the extent Plaintiff argues that VWR could have modified Plaintiff's role or placed him in a different position, the Court finds that Defendants were entitled to rely on the medical evidence indicating he was unable to work.[3] *See Swonke*, 327 F. Supp. 2d 1128, 1137–38; *see also Tipton v. Airport Terminal Servs., Inc.*, No. CV1809503ABJEMX, 2020 WL 3980127, at *7 (C.D. Cal. Mar. 31, 2020) (finding the defendant "was entitled to place [p]laintiff off work entirely in line with the opinion of her physician"); *Shamir v. SCCA Store Holdings, Inc.*, No. CV 13-6672 ABC (ASX), 2014 WL 12597151, at *6 (C.D. Cal. June 9, 2014) ("Defendant was never obligated to engage in the interactive process with Plaintiff to identify the accommodations Plaintiff would need upon her return to work—even though specified in the doctor's notes—because Plaintiff's doctors never authorized her to return to work.").

To the extent Plaintiff contends that VWR could have extended Plaintiff's leave, the Court agrees that the requested leave was indefinite because the medical reports discussing, and later extending, potential return dates always framed any return as contingent on recovery from a

[3] Plaintiff's reliance on *Nadaf-Rahrov v. Neiman Marcus Grp., Inc.*, 166 Cal. App. 4th 952 (Ct. App. 2008), does not change the Court's conclusion. In *Nadaf-Rahrov*, to show there was no triable issue of fact as to plaintiff's ability to perform the essential functions of her desired position, the defendant pointed to a particular medical note from November 2003 stating that the plaintiff was unable to perform any work. *Id.* at 964–65. But the court found there was a triable issue in light of the doctor's averments that he "always maintained" that the plaintiff was capable of performing other jobs and a subsequent medical note in January 2004 "recommending [that Plaintiff] be reassigned to a position 'that would not involve bending, standing, or kneeling.' " *Id.* at 958, 965–66. Here, Plaintiff has not pointed to any evidence creating any arguable ambiguity in the medical evidence. The Court thus finds *Nadaf-Rahrov* inapposite.

surgery that had yet to be scheduled. And an employer "is not required to provide an indefinite leave of absence as a reasonable accommodation." 2 Cal. Code Regs. § 11068(c); *see Hanson*, 74 Cal. App. 4th at 226–27 ("Reasonable accommodation does not require the employer to wait indefinitely for an employee's medical condition to be corrected." (quoting *Gantt v. Wilson Sporting Goods Co.*, 143 F.3d 1042, 1047 (6th Cir. 1998))).

The Court thus **GRANTS** Defendants' motion for summary judgment as to the claims of failure to accommodate and failure to engage in the interactive process.

B. CFRA Retaliation Claim

The CFRA is contained within FEHA and allows for certain employees "to take up to a total of 12 workweeks in any 12-month period for family care and medical leave." Cal. Gov't Code § 12945.2(a); *Rogers v. Cty. of Los Angeles*, 198 Cal. App. 4th 480, 487 (Ct. App. 2011). The CFRA makes it unlawful for an employer "to discharge, fine, suspend, expel, or discriminate against, any individual because of . . . [a]n individual's exercise of the right to family care and medical leave provided by" the CFRA. Cal. Gov't Code § 12945.2(k).[4] "Violations of the CFRA generally fall into two types of claims: (1) 'interference' claims in which an employee alleges that an employer denied or interfered with her substantive rights to protected medical leave, and (2) 'retaliation' claims in which an employee alleges that []he suffered an adverse employment action for exercising her right to CFRA leave." *Rogers*, 198 Cal. App. 4th at 487–88.[5]

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[4] Prior to the recent amendment of the CFRA, the retaliation provision was listed as subsection (*l*). *See* Cal. Gov't Code § 12945.2(*l*) (version repealed eff. 1/1/21), 12945.2(k) (added Stats. 2020, Ch. 86; eff. 1/1/21).

[5] Plaintiff contends that a CFRA interference claim should proceed to trial because Defendants did not move to dismiss it or otherwise address it. Opp. at 22. Plaintiff clearly brought a CFRA "discrimination and retaliation" claim, citing to the section of the statute that makes it unlawful to "discharge . . . or discriminate against, any individual because of . . . an individual's exercise of the right to family care and medical leave." *See* Compl. ¶ 48 (citing Cal. Gov't Code § 12945.2(*l*)). But Plaintiff did not raise a CFRA interference claim in his complaint or include that claim in his statement of legal issues in his case management conference statement. *See* Dkt. No. 18 at 3 (listing five FEHA claims, a wrongful termination claim, and a claim for "discrimination and retaliation in violation of CFRA"); *see also Bareno v. San Diego Cmty. Coll. Dist.*, 7 Cal. App. 5th 546, 559 n.11 (Ct. App. 2017) (explaining that "[t]he statutory authority for an 'interference' claim arises from section 12945.2, subdivision (t), which makes it unlawful for an employer 'to interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right' provided by CFRA," and contrasting this claim to retaliation claims arising under subdivision (*l*)(1)). The Court rejects Plaintiff's attempt to add a CFRA interference claim for the first time in his opposition to Defendants' motion for summary judgment. *See Echlin v. PeaceHealth*, 887

To make a prima facie showing of retaliation under the CFRA, a plaintiff must establish that "(1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action because he or she exercised the right to take CFRA leave." *Rogers*, 198 Cal. App. 4th at 491 (emphasis omitted). Retaliation claims under the CFRA are subject to the *McDonnell Douglas* burden-shifting analysis. *Moore v. Regents of Univ. of California*, 248 Cal. App. 4th 216, 248 (Ct. App. 2016).

Plaintiff contends that he took protected leave beginning in March 2018 and that Plaintiff's leave was a "substantial motivating reason for discharging him." Opp. at 22. Defendants argue that this count fails because VWR terminated Plaintiff for a legitimate, nondiscriminatory reason. Mot. at 14. The Court agrees, because as previously noted, Plaintiff fails to meet his burden of showing any triable issue as to whether VWR's proffered legitimate nondiscriminatory reason for terminating him was pretextual. *See Chavez v. JPMorgan Chase & Co.*, 731 F. App'x 592, 595 (9th Cir. 2018) (holding the plaintiff's CFRA retaliation claim "fail[ed] because she cannot show that [defendant's] reason for terminating her was pretextual").[6] Accordingly, the Court **GRANTS** Defendants' motion for summary judgment as to the retaliation claim.[7]

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F.3d 967, 978 (9th Cir. 2018); *see also Burrell v. Cty. of Santa Clara*, No. 11-CV-04569-LHK, 2013 WL 2156374, at *11 (N.D. Cal. May 17, 2013) (citations omitted) (holding that the court would "not consider claims raised for the first time at summary judgment which Plaintiffs did not raise in their pleadings").

[6] As an unpublished Ninth Circuit decision, *Chavez* is not precedent, but can be considered for its persuasive value. *See* Fed. R. App. P. 32.1; CTA9 Rule 36-3.

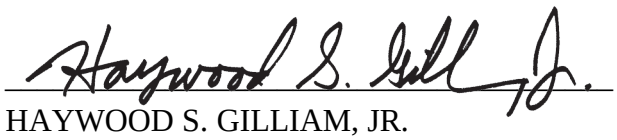
[7] With no surviving claim, the Court finds that any question regarding the punitive damages claim is moot. And because Plaintiff's claim for wrongful termination is derivative of both his FEHA and CFRA claims, it fails for the same reasons the Court found those claims deficient. Accordingly, the Court **GRANTS** Defendants' motion for summary judgment as to the wrongful termination claim.

IV. CONCLUSION

The Court **GRANTS** Defendants' motion for summary judgment. The Clerk is directed to enter judgment in favor of Defendants and close the file.

IT IS SO ORDERED.

Dated: 5/13/2021



HAYWOOD S. GILLIAM, JR.
United States District Judge